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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

IN RE BANC OF CALIFORNIA  
SECURITIES LITIGATION

CASE NO. SACV 17-00118 AG (DFMx)  
consolidated with  
SACV 17-00138 AG (DFMx)

This Document Relates to:  
  
ALL ACTIONS

**DEFENDANT STEVEN A. SUGARMAN'S  
NOTICE OF MOTION AND MOTION  
FOR ORDER DE-DESIGNATING  
DOCUMENTS IMPROPERLY  
DESIGNATED CONFIDENTIAL OR  
ATTORNEYS' EYES ONLY PURSUANT  
TO STIPULATION AND PROTECTIVE  
ORDER**

**[REDACTED VERSION OF DOCUMENT  
PROPOSED TO BE FILED UNDER  
SEAL]**

Judge: Honorable Douglas F. McCormick  
Date: October 1, 2019  
Time: 10:00 a.m.  
Place: Courtroom 6B  
Trial Date: February 18, 2020

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on October 1, 2019, at 10:00 a.m. or as soon  
3 thereafter as the matter may be heard, in the Courtroom of the Honorable Douglas  
4 F. McCormick, Courtroom 6B, United States District Court for the Central District  
5 of California, located at 411 West Fourth Street, Santa Ana, California, Defendant  
6 Steven A. Sugarman will and hereby does move for an Order De-Designating  
7 Documents Improperly Designated Confidential or Attorneys' Eyes Only Pursuant  
8 to the Stipulation and Protective Order as laid out in the [Proposed] Order filed  
9 concurrently herewith.

10 This Motion is based on this Notice of Motion and Motion, the Declaration of  
11 Joseph De Leon in support and exhibits thereto, and any other materials the Court  
12 may consider prior to its decision on this Motion.

13  
14 Dated: September 3, 2019

LATHAM & WATKINS LLP

15  
16 By: /s/ Manuel A. Abascal  
17 Manuel A. Abascal  
18 Attorneys for Defendant Steven A.  
19 Sugarman  
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1 **I. INTRODUCTION**

2 Mr. Steven A. Sugarman hereby seeks an order compelling Banc of  
3 California, Inc. (“Banc”) to withdraw its designations of documents as  
4 “Confidential” or “Highly Confidential - Attorneys’ Eyes Only” pursuant to the  
5 Stipulation and Protective Order in this case (Dkt. 83) (hereinafter, the “Protective  
6 Order”). In its Protective Order, this Court instructed the Parties to limit  
7 designations only to documents that may cause a competitive injury, not to  
8 designate public material, and specifically prohibited mass, indiscriminate, or  
9 routinized designations:

10 **Mass, indiscriminate, or routinized designations are prohibited.**  
11 **Unjustified designations may expose the designator to sanctions.**

12 Designation under this Order is allowed only if the designation is  
13 necessary to protect material that, if disclosed to persons not  
authorized to view it, would cause competitive or other recognized  
harm. Material may not be designated if it has been made public, or if  
designation is otherwise unnecessary to protect a secrecy interest.

14 (Dkt. 82 at 2) (emphasis added). Despite this clear warning against mass  
15 designation, Banc appears to have designated every single page of its 464,010  
16 production as “Confidential” or “Highly Confidential – Attorney’s Eyes Only.”  
17 The documents designated do not involve competitively sensitive material, but  
18 rather years-old historical facts regarding events and subject matters that Banc,  
19 Plaintiff, third parties have discussed in numerous public news articles, pleadings,  
20 securities disclosures, and other media for the past three years. Some of the  
21 documents designated even include public articles. This over-designation has  
22 caused this Court and the litigants to spend substantial additional resources because  
23 designated material must be filed provisionally under seal, requiring time  
24 consuming and unnecessary briefing. The over-designation is also inconsistent  
25 with the principle of public access to court proceedings.

26 Banc’s over-designation creates the unfair situation where Plaintiff and Banc  
27 have made public, disparaging statements about historical facts related to Mr.  
28 Sugarman in pleadings and other public filings, and the documents disproving

1 these public statements are designated as confidential thus hiding from the public a  
 2 complete record of the events in question. *See Kamakana v. City & Cty. of*  
 3 *Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (“Unless a particular record is one  
 4 ‘traditionally kept secret,’ a ‘strong presumption in favor of access’ is the starting  
 5 point”).

6 Banc has not provided any proper basis for designating these materials as  
 7 “Confidential” or “AEO,” and it is apparent they are seeking to selectively disclose  
 8 and spin facts about historical events to manage their public image and that of  
 9 certain directors, rather than protecting any commercial business reason for  
 10 confidentiality of these three-year-old, already public historical events. The  
 11 Protective Order in this case is not intended to allow one party, in this case Banc,  
 12 to be empowered to selectively manage its media presence while preventing other  
 13 parties from responding publicly.

14 Banc’s abuse of the AEO designation is particularly harmful to Mr.  
 15 Sugarman because the Protective Order is ambiguous as to whether Mr.  
 16 Sugarman—as the sole individual party, as opposed to entity, in this case—is  
 17 allowed to view such documents. Mr. Sugarman requested that the parties agree to  
 18 resolve this ambiguity and allow Mr. Sugarman to view AEO documents, but Banc  
 19 refused. Not allowing Mr. Sugarman to review AEO material prevents him from  
 20 seeing the evidence in this matter, which among other things complicates  
 21 settlement negotiations.

22 Banc’s overreach is perhaps best exemplified by four productions of emails  
 23 it made in late February and early March—*after the close of fact discovery*—which  
 24 Banc designated as AEO *in their entirety*. These emails involve three-year-old  
 25 historical facts about who prepared the October 18, 2016 press release, the subject  
 26 of substantial litigation in this case. They include [REDACTED]

27 [REDACTED]  
 28 [REDACTED]

1 Banc permitted the law firm hired by a special committee of Banc's board of  
 2 directors to produce drafts of the Press Release that came from Mr. Sugarman's  
 3 computer without the AEO designation. There is no legitimate reason why a 2:58  
 4 p.m. draft of the press release sent from Mr. Sugarman's computer is not  
 5 designated AEO, while [REDACTED]  
 6 [REDACTED] is designated AEO. AEO designations should  
 7 involve "extremely sensitive" information such as business strategy or potential  
 8 acquisitions, not three-year-old emails about historical events that are already the  
 9 subject of extensive public disclosure and litigation. Banc's effort to deny Mr.  
 10 Sugarman the ability to review evidence critical to his defense makes it impossible  
 11 for him to defend himself effectively in this case.

12 Banc, as the designating party, bears the burden of establishing that its  
 13 designations of documents as Confidential and AEO are proper and it has not.  
 14 Banc did not even respond to Mr. Sugarman's two letters requesting a meet and  
 15 confer on the issue. Many of the documents Banc has designated in this case  
 16 clearly do not qualify for the protections asserted, and Banc's blanket over-  
 17 designations are prejudicing Mr. Sugarman's defense and burdening this Court.

18 Given the sheer scope of the mass over-designation, and Banc's complete  
 19 refusal to meet and confer regarding this issue, the Court should rule that all of  
 20 Banc's designations are removed and that if Banc wishes to reinstate any  
 21 designation, it must present to the Court a specific request with evidence  
 22 supporting their designation. In the alternative, Mr. Sugarman requests that the  
 23 documents attached in Exhibit P<sup>1</sup> be immediately de-designated.

## 24 **II. BACKGROUND**

25 On November 13, 2017, the Court entered the Protective Order, which sets  
 26 forth the proper bounds of confidentiality in this case. (Dkt. 83.) It explicitly

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27  
 28 <sup>1</sup> Exhibits referenced herein are exhibits to the declaration of Joseph De Leon, filed concurrently herewith.

1 “does not confer blanket protections on all disclosures or responses to discovery,  
 2 and the protection it gives from public disclosure and use extends only to the  
 3 specific material entitled to confidential treatment under the applicable legal  
 4 principles.” (*Id.* at 1.) The Order provides for two categories of non-public  
 5 designations, Confidential and AEO, which it defines as follows:

- 6 • “Confidential Information. A party or non-party may designate as  
 7 ‘CONFIDENTIAL’ any confidential, proprietary, personal and/or trade-  
 8 secret technical, scientific, business, or financial information that is not  
 9 generally known and that the producing party would normally maintain  
 10 in confidence and not reveal to a third party or would cause third parties  
 11 to maintain in confidence.” (*Id.*) Documents designated as Confidential  
 12 may only be disclosed to parties and certain others in the context of this  
 13 litigation. (*Id.* at 4-5.)
- 14 • “Highly Confidential - Attorneys’ Eyes Only Information. A party or  
 15 non-party may designate as ‘HIGHLY CONFIDENTIAL -  
 16 ATTORNEYS’ EYES ONLY’ extremely sensitive ‘CONFIDENTIAL’  
 17 information disclosure of which to another party or non-party would  
 18 create a substantial risk of serious harm that could not be avoided by less  
 19 restrictive means.” (*Id.* at 2.) Documents designated as AEO may only  
 20 be disclosed to outside counsel and certain others in the context of this  
 21 litigation, but may not be disclosed to the parties themselves. (*Id.* at 5-6.)

22 The Protective Order further states: “Designation under this Order is allowed only  
 23 if the designation is necessary to protect material that, if disclosed to persons not  
 24 authorized to view it, would cause competitive or other recognized harm. Material  
 25 may not be designated if it has been made public, or if designation is otherwise  
 26 unnecessary to protect a secrecy interest.” (*Id.* at 2.)

27 Additionally, the Protective Order explicitly prohibits over-designation. It  
 28 states that a party using the Confidential or AEO designations “must only



1 designate specific material that qualifies under the appropriate standards” and  
 2 “only those parts of documents, items, or oral or written communications that  
 3 require protection shall be designated.” (*Id.* at 2.) Designating full productions  
 4 that do not qualify under the Protective Order standards is explicitly identified as  
 5 sanctionable: “Mass, indiscriminate, or routinized designations are prohibited.  
 6 Unjustified designations may expose the designator to sanctions.” (*Id.* at 2.) And  
 7 parties are required to promptly address issues identified with their productions:  
 8 “If a designator learns that information or items that it designated for protection do  
 9 not qualify for protection at all, or do not qualify for the level of protection initially  
 10 asserted, that designator must promptly notify all parties that it is withdrawing the  
 11 mistaken designation.” (*Id.* at 2.)

12 From October 2017 to January 2019, Banc produced 464,010 pages of  
 13 documents in this case. Banc did not include with those productions any metadata  
 14 indicating the confidentiality designations of individual documents, making it  
 15 extremely difficult to identify the exact number of documents designated as either  
 16 Confidential or AEO. But it appears that all, or substantially all, documents in  
 17 those productions were stamped either Confidential or AEO. Examples of  
 18 documents Banc designated as Confidential or AEO demonstrate that the  
 19 productions clearly do not meet the standards required for such designations. The  
 20 improperly designated documents include the following:

21 • Documents designated as Confidential:

- 22 ○ [REDACTED]
- 23 [REDACTED] (BOC\_000006302, Ex. A.)
- 24 ○ [REDACTED] (BOC\_000034046,
- 25 BOC\_000002045, Exs. B, C.)
- 26 ○ [REDACTED] (BOC\_000028350,
- 27 BOC\_000003885, BOC\_000012848, Ex. D-F.)

• Documents designated as AEO:

- October 18, 2016 emails from John Grosvenor, General Counsel of Banc, to Matthew Guest of Wachtell, Lipton, Rosen & Katz, copying Steven Sugarman, [REDACTED] [REDACTED] (BOC\_000463907, BOC\_000463909, Exs. G, H.)
- An October 18, 2016 email from Hugh Boyle to John Grosvenor, stating, [REDACTED] (BOC\_000463922, Ex. I.)
- An October 18, 2016 email [REDACTED] [REDACTED]. (BOC\_000464014, Ex. J.)
- A May 9, 2016 email from Steven Sugarman to Halle Benett stating, in full, [REDACTED] [REDACTED] (BOC\_000463983, Ex. K.)

As the Court can see from this very briefing, Mr. Sugarman is required to follow the cumbersome sealing procedures to protect from disclosure information that is either public or clearly not confidential.

In February and March 2019—after the close of fact discovery—Banc produced four additional volumes of documents, totaling 92 documents, that it designated AEO *in their entirety*.<sup>2</sup> Included in these productions were highly important documents that contradict Banc’s claims against Mr. Sugarman. For example, in public statements, the *Seabold* Amended Answer, and discovery responses in this case that Banc did not designate as Confidential or AEO, Banc has alleged that Mr. Sugarman was solely responsible for drafting the October 18 press release, and that he did so while knowing it to be incorrect. But documents in these productions demonstrate that Banc’s public accusations against Mr.

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<sup>2</sup> As a result of this late production, which includes key documents impacting the parties positions, Mr. Sugarman will soon be filing a separate motion seeking to reopen discovery regarding the late-produced documents, including the re-opening of Mr. Grosvenor’s deposition to address these documents and a deposition of Mr. Sedabres, the Banc employee whose role was implicated by the late production.

1 Sugarman were false. (Ex. L.) [REDACTED]  
2 [REDACTED]  
3 [REDACTED]. The documents also show  
4 [REDACTED]  
5 [REDACTED] These documents establish [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 Furthermore, a redline of [REDACTED]  
10 [REDACTED] shows obvious and  
11 material differences. (Ex. M.) There simply is no justification for designating the  
12 post-discovery cut off documents as AEO, and it appears that Banc did so purely to  
13 keep Mr. Sugarman from seeing facts that support his claims.

14 In fact, any and all emails about the October 18th Press Release are not  
15 “confidential, proprietary, personal and/or trade-secret technical, scientific,  
16 business, or financial information that is not generally known” and thus should not  
17 be designated at all. The 2016 Press Release is described in detail in Plaintiff’s  
18 Complaint (now over two and a half years old), Banc’s securities disclosures, and  
19 court filings in this case. These emails are certainly not “extremely sensitive  
20 ‘CONFIDENTIAL’ information disclosure of which to another party or non-party  
21 would create a substantial risk of serious harm that could not be avoided by less  
22 restrictive means” as required for an AEO designation. Further, it is manifestly  
23 unfair to Mr. Sugarman to allow a situation where Plaintiff and Banc’s allegations  
24 about Mr. Sugarman’s involvement in the October 18<sup>th</sup> Press Release are made  
25 public, while literally **every single document** produced by Banc on that same topic  
26 is designated as Confidential or Attorney’s Eyes Only and must be filed under seal.

**III. BANC REFUSED TO MEET AND CONFER**

Because the Protective Order provides that “[a]ll challenges to confidentiality designations shall proceed under L.R. 37-1 through L.R. 37-4” (Dkt. 83 at 4), on July 8, 2019, Mr. Sugarman sent Banc a letter challenging Banc’s indiscriminate over-designation of documents as Confidential and AEO, and included a list of documents that Mr. Sugarman contends do not qualify for the protection asserted. (Ex. N.) Banc never responded to that letter. On August 19, 2019, Mr. Sugarman again wrote to Banc, noting that Banc had not responded to the July 8 letter, Mr. Sugarman remained willing to meet and confer on these issues, but that he intended to seek relief from the Court if Banc did not correct its myriad over-designations. (Ex. O.) Banc similarly never responded to that letter. In short, Banc violated this Court’s order by mass designating every document, and when asked to meet and confer on the issue, simply ignored the request (twice). Because Banc has refused to meet and confer on these issues, pursuant to L.R. 37-2.4 Mr. Sugarman has filed the present motion as a noticed motion instead of as a joint stipulation.

**IV. ARGUMENT**

**A. Banc Cannot Satisfy Its Burden to Establish that the Designated Documents Are Entitled to Protection, and therefore the Documents Should Be Ordered De-Designated**

Banc bears the burden of establishing that its confidentiality designations are appropriate, which, given its pervasive over-designations, is a burden it cannot meet here. “[W]hen a confidentiality designation is challenged, the burden of persuasion rests upon the designating party,” *Louisiana Pac. Corp. v. Money Mkt. 1 Institutional Inv. Dealer*, 285 F.R.D. 481, 490 (N.D. Cal. 2012), and that party “must establish good cause for each particular document for which protection is sought by demonstrating that harm or prejudice would result from removing the designation,” *Echostar Satellite LLC v. Freetech, Inc.*, No. C 07-6127 JW RS,

2009 WL 8398697, at \*1 (N.D. Cal. Aug. 5, 2009); *see also Karoun Dairies, Inc. v. Karoun Dairies, Inc.*, No. 08-CV\_1521-AJB WVG, 2014 WL 5170800, at \*6 (S.D. Cal. Oct. 14, 2014) (“The burden of proof to maintain the confidentiality of any document is on the party seeking to maintain the confidentiality.”) (citing *In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 424 (9th Cir. 2011) (“When the protective order ‘was a stipulated order and no party ha[s] made a ‘good cause’ showing, then ‘the burden of proof ... remain[s] with the party seeking protection.’”)).

Under the Protective Order, a party may designate as Confidential only those materials that are “confidential, proprietary, personal and/or trade-secret technical, scientific, business, or financial information that is not generally known and that the producing party would normally maintain in confidence and not reveal to a third party or would cause third parties to maintain in confidence.” (Dkt. 82 at 1.) Similarly, a party may designate as AEO only “information disclosure of which to another party or non-party would create a substantial risk of serious harm that could not be avoided by less restrictive means.” (*Id.* at 2.) The Protective Order explicitly prohibits “[m]ass, indiscriminate, or routinized designations,” and provides that over-designation may subject a party to sanctions. *Id.*

Banc designated all, or substantially all, of the documents it produced as Confidential or AEO, directly contravening the Protective Order’s prohibition against mass and indiscriminate designations. Furthermore, many, if not the majority, of documents Banc designated are not entitled to any protection at all under the terms of the Protective Order and governing law, or are entitled to a lesser degree of protection than Banc has asserted. Attached as Exhibit P is a list of specific documents that Mr. Sugarman contends are over-designated, and Mr. Sugarman seeks an order compelling Banc to de-designate these documents.

In many cases, Banc’s apparent purpose in seeking to keep documents confidential is to protect Banc’s own public image, which is not a proper basis for

1 confidentiality, especially considering the many public statements Banc has made  
2 that are harmful to Mr. Sugarman. *See Minter v. Wells Fargo Bank, N.A.*, Nos. 07-  
3 3442, 08-1642, 2010 WL 5418910, at \*7 (“the Court recognizes that there is both  
4 strategic and financial incentive to over-designate. ... [D]esignation shields from  
5 public view a company’s documents.”). Throughout this case, Banc has sought to  
6 publicly portray Mr. Sugarman in a negative light, while attempting to keep  
7 information exonerating Mr. Sugarman, or reflecting negatively on Banc,  
8 confidential. Banc made public allegations about the drafting of the October 18th  
9 Press Release in securities disclosures dated January 23, 2017 and February 9,  
10 2017. Banc also made public disparaging, allegations against Mr. Sugarman in an  
11 Amended Answer filed in the *Seabold v. Banc of California* litigation, which Banc  
12 leaked to the *Los Angeles Times* before filing. The Amended Answer describes in  
13 public and in detail Banc’s version of events regarding the drafting of the October  
14 18, 2016 press release. If that subject matter was confidential or extremely  
15 sensitive, Banc would have never described these facts in a public document not  
16 filed under seal. Banc has also adopted these disparaging statements in discovery  
17 responses in this litigation that it did not mark as Confidential or AEO. It is  
18 inequitable to allow Banc to disparage Mr. Sugarman publicly and in discovery  
19 responses, but then seek to keep documents that exonerate Mr. Sugarman  
20 confidential or AEO.

21 Furthermore, it appears that in many cases Banc strategically designated  
22 documents as AEO in order to prevent Mr. Sugarman from seeing documents  
23 undermining Banc’s allegations against him. As noted above, documents in  
24 Banc’s February and March 2019 productions, which were designated as AEO in  
25 their entirety, demonstrate that Banc’s public statements concerning Mr.  
26 Sugarman’s involvement in the October 18 press release are false. There is no  
27 legitimate reason for Banc to have designated these documents as AEO. Banc  
28 permitted hundreds of documents regarding the October 18 press release to be

1 produced without such a designation, including a draft sent at 2:58 p.m. from Mr.  
2 Sugarman's computer that is [REDACTED]  
3 [REDACTED] (Ex. Q.)  
4 There is no legitimate reason why a 2:58 p.m. draft of the release sent from Mr.  
5 Sugarman's computer is not designated AEO, while a [REDACTED]  
6 [REDACTED] is designated AEO. The only explanation for such inconsistent  
7 designations is that Banc does not want Mr. Sugarman to see evidence  
8 undermining Banc's claims that he drafted the press release by himself.

9 As the designating party, it is Banc's burden to establish good cause for each  
10 particular document it seeks to protect. Despite Mr. Sugarman's invitations for  
11 Banc to justify its confidentiality designations, it has refused to do so. Given the  
12 undue burden that Banc has placed on the parties and this Court by presumptively  
13 designating seemingly all of its documents as Confidential, the Court should  
14 remove all of Banc's designations and require Banc to present to the Court a  
15 specific request with evidence supporting their designation if it wishes to reinstate  
16 any designations. *See Del Campo v. Am. Corrective Counseling Servs., Inc.*, No.  
17 C-01-21151JWPVT, 2007 WL 3306496, at \*1-4 (N.D. Cal. Nov. 6, 2007)  
18 (ordering the entirety of defendants production de-designated due to over-  
19 designation and the failure to justify designations). Alternatively, all of the  
20 documents in Exhibit P should be de-designated immediately (although Mr.  
21 Sugarman notes that this may not be an exhaustive list).

## 22 V. CONCLUSION

23 For the reasons noted above, Mr. Sugarman respectfully requests that the  
24 Court grant the relief requested herein.

25 Dated: September 3, 2019

LATHAM & WATKINS LLP

26  
27 By: /s/ Manuel A. Abascal  
Manuel A. Abascal  
Attorneys for Defendant Steven A.  
28 Sugarman